IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 11, 2009

# STATE OF TENNESSEE v. JOSEPH SCOTT TAYES

**Direct Appeal from the Criminal Court for Davidson County**
**No. 2006-C-2335 Cheryl Blackburn, Judge**

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**No. M2008-01101-CCA-R3-CD - Filed November 4, 2009**

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Defendant, Joseph Scott Tayes, was indicted for attempted first degree premeditated murder. On February 14, 2008, Defendant entered a plea of guilty to the lesser offense of attempted second degree murder. Pursuant to the terms of the plea agreement, Defendant agreed to a sentence of ten years as a Range I, standard offender, with the manner of service of his sentence to be determined by the trial court. Following a sentencing hearing, the trial court denied Defendant's request for alternative sentencing and ordered Defendant to serve his sentence in confinement. On appeal, Defendant challenges the trial court's denial of his request for alternative sentencing. After a thorough review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Charles E. Walker, Nashville, Tennessee, for the appellant, Joseph Scott Tayes.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Rob McGuire, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Background

The transcript of the guilty plea submission hearing is not included in the record. See State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999) (observing that "a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed"). Therefore, the facts surrounding Defendants' convictions may only be gleaned from the presentence report and the testimony presented at the sentencing hearing.

The official version of the facts contained in the presentence report provides as follows:

> On March 31, 2006, at approximately 2351 [hours], South patrol officers responded to a domestic related stabbing at 180 Wallace Road, Apt. K10. When the officers arrived at the above location, they found that the victim, George Zacharias, was stabbed multiple times and the suspect was stabbed once. The victim was transported to Vanderbilt Hospital ER for his injuries. The defendant was transported to Southern Hills ER for his injuries. Detective Michael Gooch went to Southern Hills to interview the defendant. This detective advised Joseph Tayes that police were standing by his apartment and he was requesting him to sign a consent form for his premises. Consent was granted. Tayes advised that he and his boyfriend that lived with him had gotten into an argument earlier that night over the victim's drug problem. The suspect advised the victim that he was "through" and that he was going to stay with a friend named Becky for the evening. At that time the victim took the suspect's wallet and keys and left the residence going to the parking lot at the complex. The victim had a machete style antique knife and the suspect was threatened with the knife. They got into a scuffle and the victim made the suspect go back to the apartment. The victim threw the keys on top of the vehicle. When they got back to the apartment, the victim pushed the suspect from behind and then stabbed the suspect on the inner part of his left leg. The suspect then pulled the knife and stabbed the victim 2-3 times to get him off him. The suspect ran out of the apartment, called police and reported the incident. Detective Gooch advised the suspect that he did not believe he was being completely honest about what happened. The suspect then advised that he was the one with the knife and the victim tried to get the knife from the suspect. While the suspect was holding the knife, he was stabbed in the left leg. The victim would not let the suspect take the knife out at first, but when he did, that is when he stabbed the victim 2-3 times. Detective Gooch then went to Vanderbilt ER to see the victim but the victim was unable to be interviewed due to his injuries and being in surgery. This Detective received information that the victim had multiple stab wounds in and around his intestines in excess of ten puncture wounds and that they were critical.

## II. Sentencing Hearing

George Corey Adam Zacharias testified that he was living with Defendant at the time of the offense. Mr. Zacharias said that on March 31, 2006, and into the early hours of April 1, 2006, he and Defendant argued over each other's use of drugs and about their relationship which Mr. Zacharias wanted to terminate. Mr. Zacharias asked for his ring back. Defendant held out his left hand and said, "Here, take it." Mr. Zacharias said that Defendant was standing at the end of the kitchen counter with his right hand behind his back. Mr. Zacharias walked up to Defendant, grabbed his left wrist, and started to pull the ring off Defendant's finger. Mr. Zacharias stated that Defendant stabbed him in his left armpit, then in the side, and twice in the front of his body. Mr. Zacharias said that

Defendant stared Mr. Zacharias "in the eye the whole time." Mr. Zacharias said that Defendant's eyes were full "of pain, anger, rage."

Mr. Zacharias said that there was a gap in his memory of the event after he was stabbed the fourth time. The next thing Mr. Zacharias remembered was standing behind Defendant with his right arm around Defendant's neck. Mr. Zacharias said that he believed that Defendant's feet were off the floor. Defendant told Mr. Zacharias that he could not breathe, and Mr. Zacharias told Defendant to drop the knife. After Defendant dropped the knife, Mr. Zacharias pushed Defendant away, ran out the front door and into the apartment's parking lot. Mr. Zacharias opened his car door to retrieve the receipt for the ring he had given Defendant and heard Defendant behind him talking on his cell phone. Mr. Zacharias heard Defendant tell someone that Mr. Zacharias was trying to steal his car. Mr. Zacharias backed away from Defendant and then ran back to the apartment.

Mr. Zacharias assessed his injuries. He said he saw two stab wounds in his stomach, and there appeared to be "tissue" hanging out of his left side. Mr. Zacharias wrapped a towel tightly around his stomach to staunch the flow of blood. Mr. Zacharias believed that his lung had been punctured because it was difficult to breathe. Mr. Zacharias said that the paramedics arrived about ten minutes later. Mr. Zacharias stated that he was transported to the Vanderbilt Hospital emergency room, and later underwent surgery. Mr. Zacharias described his injuries as "life threatening," and he said it took approximately two years to recover. Mr. Zacharias stated that he could not work for six months after the offense, and was "very fearful at first."

On cross-examination, Mr. Zacharias said that he and Defendant had been in a relationship for approximately twenty-two months, and Mr. Zacharias gave Defendant a ring approximately seven months into the relationship. Mr. Zacharias denied that Defendant had any reason to fear him.

According to the presentence report which was introduced as an exhibit without objection, Defendant was twenty-nine years old at the time of the sentencing hearing. Defendant dropped out of school during his freshman year but reported earning his G.E.D. at Flathead Valley Community College in Kalispell, Montana. Defendant does not have a history of criminal convictions. Defendant stated in the report that he began using alcohol and marijuana at twelve on a weekly basis until four years before the sentencing hearing. Defendant also reported that he started using cocaine at sixteen and consumed one gram "every once in a while" until 2006. According to the presentence report, Defendant has been diagnosed with post-traumatic stress disorder as a result of being abused, bipolar disorder and depression, although he was not currently taking any medication.

Defendant testified that he worked twelve hours on March 31, 2006, while Mr. Zacharias drove around in Defendant's car. A friend told Defendant that Mr. Zacharias was with another man. Defendant said that Mr. Zacharias was approximately one hour late picking Defendant up from work, and the two men began arguing as soon as Defendant got in the car. Defendant decided to spend the night at his cousin's house, and Mr. Zacharias grew angry when Defendant started to leave the apartment. Defendant said that Mr. Zacharias took the ring off Defendant's finger and ran out the front door with the keys to Defendant's vehicle. Defendant followed him with his cell phone.

Defendant said that Mr. Zacharias approached Defendant and "slammed" the car keys into Defendant's hand, cutting one of his fingers. Defendant stated that Mr. Zacharias "strong-armed" him back up the stairs to the apartment, and Defendant knew "that this was not going to be . . . a happy occurrence."

Defendant said that he and Mr. Zacharias had fought on numerous occasions, and that he was afraid of Mr. Zacharias. Defendant said that Mr. Zacharias "beat [him] up all the time." Defendant said that Mr. Zacharias would apologize after each incident, and their relationship would "go good" for approximately two months when Mr. Zacharias would again abuse Defendant. Defendant said that he never defended himself against these attacks until the day of the offense.

Defendant stated that he was "infuriated" and scared during his argument with Mr. Zacharias. Defendant said that he did not know what Mr. Zacharias would do to him. Defendant stated that he weighed approximately 120 pounds at the time of the offense, and Mr. Zacharias weighed between 180 and 190 pounds. Defendant said, "At some point, we both ended up with a knife," and that scared Defendant. Defendant ran for the door and felt Mr. Zacharias stab him in the leg. Defendant and Mr. Zacharias struggled for the knife in Defendant's leg, and Defendant managed to gain possession of the knife. Defendant said, "I squinted my eyes shut real tight, and just started jabbing [the knife] behind me." Defendant said that after Mr. Zacharias fell off of him, Defendant ran out of the front door screaming for someone to call 911. Defendant stated that he "was trying to save my life" when he stabbed Mr. Zacharias, and he "just wanted to get away."

Defendant said that his father began sexually abusing him was he was approximately seven years old. Defendant stated that the abuse "led to [him] seeking out abusive relationships in [his] life and thinking that it was normal to be in relationships with violent people." Defendant said that his father told him that if he told anyone about the abuse, he would kill Defendant's mother.

Defendant stated that if he was granted probation, he would stay at first with his pastor, Steven Raimo. Defendant said that his mother would help him find an apartment, and she had offered to pay the deposits for the utilities and the first month's rent. Defendant stated that he would find a job at a restaurant because he had approximately eight years experience as a server. Defendant said that he hoped to return to college in the fall and pursue a degree in nursing so that he could help people who had been abused. Defendant said that before the sentencing hearing, he met with Dawn Dakote with the Mental Health Co-op who told Defendant that he could attend a group therapy program at Centerstone Mental Health Center as soon as he was released.

On cross-examination, Defendant said that he had stopped using cocaine approximately one week before the offense. Defendant acknowledged, however, that he began to abuse his prescription pain medicine after he was released on bond. Defendant explained that he missed a scheduled court appearance on April 20, 2007, because his counsel told him that his next court date was August 27, 2007. Defendant acknowledged that his bond was revoked because of the missed court date. Defendant denied that he tested positive for drugs when he underwent a court-ordered drug test.

Defendant acknowledged that he told the 911 operator that Mr. Zacharias was armed with an antique machete-type knife. Defendant denied that he stabbed Mr. Zacharias from the front or that he stabbed himself in the leg to support his claim that he was acting in self-defense.

In response to the court's questions, Defendant said that he agreed to enter a plea of guilty to attempted second degree murder despite his self-defense claim because he felt that a jury would be more likely to believe Mr. Zacharias and because there were no witnesses to any of the prior incidents of abuse by Mr. Zacharias. Defendant acknowledged that he did not seek help for his mental health problems while he was released on bond.

Defendant said that he called the police approximately five times between November 2005 and March 2006 to report Mr. Zacharias' abuse, but he did not press charges against Mr. Zacharias. Defendant said that the police officers always believed Mr. Zacharias' side of the story and simply told the two men to separate. According to the Metro Nashville Police Department's computer aided dispatch report which was introduced as an exhibit at the sentencing hearing, Defendant called the police department on November 28 and December 22, 2005, and on February 8, 10, and 11, 2006. Defendant acknowledged that the reason for the first four calls was listed as "theft" on the report. Defendant explained that after Mr. Zacharias abused him, he always tried to leave in Defendant's vehicle, so Defendant reported both theft and abuse. Defendant acknowledged that the report indicated that only one call had been made on March 31, 2006, but he insisted that he called 911 three times that night.

Steven Raimo testified that he had known Defendant between three and four years. Mr. Raimo said that he had spoken with the manager of the apartment complex next to his, and he believed Defendant would be able to rent an apartment. Mr. Raimo said that Defendant's apartment would be within walking distance of his apartment, and Mr. Raimo would welcome Defendant at any time. Mr. Raimo said that he was the associate pastor of the Experience Worship Center. Mr. Raimo said that Defendant had been made an honorary member of the congregation even though he had not been able to attend services, and the congregation was willing to support and help Defendant if he was granted probation. Mr. Raimo said that he was aware of Defendant's past history of abuse and drug usage, and that he was currently in a relationship in which Defendant did not feel safe. On cross-examination, Mr. Raimo said that Defendant had never told him that Mr. Zacharias physically abused him.

Sandy Bedrin, Defendant's mother, testified that she lived in Montana, and Defendant and Mr. Zacharias came to visit her one Christmas. Ms. Bedrin said that Mr. Zacharias was angry with Defendant on several occasions, and Defendant would cry. Ms. Bedrin observed a bruise on Defendant's arm on one occasion, and a scraped knee on another day. Ms. Bedrin said that she was prepared to offer Defendant emotional and financial support if he was granted probation, and that she would like for Defendant to come to Montana to live. Ms. Bedrin said that she advised Defendant not to sign the negotiated plea agreement, but Defendant told her that he wanted to come home. Ms. Bedrin said that she was shocked when she learned of the offense and said, "I would think he would have sense enough not to be abused anymore." Ms. Bedrin said that she discovered

that Defendant had been sexually abused by his father when Defendant was nearly seventeen years old. Ms. Bedrin said that Defendant did not want to press charges against his father because of the effect that would have on his paternal grandmother.

Sherrie Preston, Defendant's aunt, said that she lived in Mt. Juliet and frequently saw Defendant. Ms. Preston said that she was aware that Mr. Zacharias abused Defendant but had never seen any physical signs of the abuse. Ms. Preston stated that Defendant had never been a violent person. Ms. Preston said that Defendant was emotional, not physical, and "anybody could tackle him and put him down." On cross-examination, Ms. Preston said that Defendant told her that he and Mr. Zacharias fought, both verbally and physically. Ms. Preston said that it was her understanding that Defendant agreed to enter a plea of guilty to attempted second degree murder in order to receive a shorter sentence so that "he could get on with his life."

Carmene Eakes, Defendant's great-aunt, testified that Defendant "was a very sweet boy," and very courteous. Ms. Eakes said she had only heard about a problem between Defendant and Mr. Zacharias through others.

At the conclusion of the sentencing hearing, the trial court considered Defendant's extensive drug use as evidence of criminal behavior, and Defendant's use of a deadly weapon during the commission of the offense. See T.C.A. § 40-35-114(1), (9). The trial court stated that it had considered both the victim's and Defendant's version of the sequence of events leading up to the stabbing of the victim. The trial court found:

> [t]he ultimate result, however, is that Mr. Zacharias almost died and had major injuries, frontal and in the back, which would not necessarily be consistent with what the defendant had to say.

The trial court also considered Defendant's failure to show up at a scheduled court appearance after he was released on bond. The trial court found, however, that:

> the most appropriate [consideration] for this case would be whether or not confinement is necessary to avoid deprecating [sic] the seriousness of the offense or is particularly suited to provide an effective deterrence to others likely to commit similar offenses. And I can deny probation when the offense is especially violent, horrifying, shocking, reprehensible, offensive or excessive to an exaggerated degree when the nature of the offense outweighs all factors favoring probation. And I guess that's kind of where I am with this. It is an especially violent offense. It was offensive. It was to an exaggerated degree. [Defendant], on the other hand, has cited he has mental health issues. I guess it's interesting to me that he didn't necessarily avail himself of the Mental Health Cooperative while he was on bond. I do notice from his report that he did end up at Vanderbilt [in] March of 2007, which is right before he went into custody, because it says inability to cope with abuse and to get medication straight. So he obviously has some issues. Does that outweigh the need

for deterrence in this case? I don't think so. So, [Defendant], I'm going to have to deny your [request for an] alternative sentence.

**III. Denial of Request for Alternative Sentencing**

Defendant argues that the trial court erred in considering deterrence as a factor in denying his request for alternative sentencing because the trial court did not make the findings set forth in State v. Hooper, 29 S.W.3d 1 (Tenn. 2001). Defendant also contends that the offense was not so especially violent or exaggerated to justify denial of alternative sentencing.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correction, however, "'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)). "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. Carter, 254 S.W.3d at 345 (quoting State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1002); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004)).

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

A defendant is no longer entitled to a presumption that he or she is a favorable candidate for probation. Carter, 254 S.W.3d at 347. Our sentencing law, however, provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(5), (6). Additionally, a trial court is "not bound" by the advisory sentencing guidelines; rather it "shall consider " them. Id. § 40-35-102(6).

Because he was convicted of a Class B felony, Defendant is not considered a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6). Nonetheless, Defendant remains eligible for an alternative sentence because his sentence was ten years or less and the offense for which he was convicted is not specifically excluded by statute. T.C.A. §§ 40-35-102(6), -303(a).

In determining whether to deny alternative sentencing and impose a sentence of total confinement, the trial court must consider if:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant....

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence.

The trial court denied Defendant's request for alternative sentencing based on a finding that "[c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses." T.C.A.§ 40-35-103(1). While we agree with Defendant that the State failed to introduce evidence regarding deterrence, we note as does the State in its brief that Hooper addresses the issue of whether deterrence alone may support a denial of alternative sentencing and articulates the criteria for such circumstances. See State v. Trotter, 201 S.W.3d 651 (Tenn. 2006). In this case, the trial court also based its denial on the seriousness of the offense and the need to avoid depreciating the seriousness of the offense. If the seriousness of the offense forms the basis for the denial of alternative sentencing, Tennessee courts have held that "'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence of confinement ." State v. Grissom, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (citing State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995); State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)).

Based on our review, we conclude that the trial court did not err when it found that Defendant's conduct was sufficiently violent, offensive and of an exaggerated degree to deny his request for probation. Both the victim and Defendant testified that they argued on the night of the

offense, and that the argument escalated. Defendant stabbed the victim repeatedly under his armpit, and in his side and abdominal region. The victim stated that his injuries were critical and life threatening. The victim was unable to work for six months following the incident, and, two years later, was just recovering his ability to move as he had before the stabbing.

The record supports the trial court's finding that the offense was indeed offensive, excessive, and of an exaggerated degree. Therefore, we conclude that the seriousness of the offense alone supports the denial of alternative sentencing, and that a sentence of confinement is necessary to avoid depreciating the seriousness of the offense. Because the denial of alternative sentencing is amply supported by factors other than deterrence, we need not further address the Hooper criteria in the case sub judice. Defendant is not entitled to relief on this issue.

**CONCLUSION**

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE